Petition

81-1793

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

JOSEPH RAGUSA AND JOHN CARESIO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a due process violation has occurred by the Eighth Circuit's judicial expansion of the definition of "firearm" in the National Firearms Act to include (as a "similar device" within the meaning of 26 U.S.C. § 5845(f)) six trash bags holding containers of gasoline, trails of paper towels, and a box of tissue containing cigarettes and matches.

2. Whether the language and legislative history of the National Firearms Act permit interpreting the definition of "firearm" and "destructive device" to include six trash bags holding containers of gasoline, trails of paper towels, and a box of tissues containing cigarettes and matches.

3. Whether an individual's mere presence at a location where a firearm is found is sufficient to support a finding that the individual was in possession of the firearm.

4. Whether an indictment which fails to state a public offense and is therefore defective may be cured by a bill of particulars.

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The petitioners, Joseph Ragusa and John Caresio, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 1, 1981.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is published at 664 F.2d 696, and is appended hereto. No opinion was rendered by the District Court for the Western District of Missouri.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 1, 1981. A timely petition for rehearing *en banc* was denied on January 28, 1982, and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§ 5845. Definition:

For the purpose of this chapter—

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and

other characteristics is primarily a collector's item and is not likely to be used as a weapon.

. . .

(f) Destructive Device.—The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrell or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparapraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

26 U.S.C.A. § 5845 (1980).

STATEMENT OF THE CASE

The petitioners were convicted under the National Firearms Act, 26 U.S.C. § 5801 *et seq.*, for possession of an unregistered firearm in violation of section 5861(d).[1] The petitioners were convicted of possessing a firearm consisting of six plastic containers of gasoline which were inside trash bags hung from the ceiling and window frames of a vacant house, paper towels which were strung throughout the house, a box of tissues in which there were cigarettes fastened by rubberbands to matchbooks without covers, and a detergent-type bottle of flammable liquid. Also, holes had been knocked in the ceiling between the floors of the house, apparently to aid circulation of the fire. As assembled, this combination of materials was, according to the prosecution, a destructive device within the meaning of the term "firearm."

The police found these materials when they were called at approximately 2:30 a.m. on June 6, 1979, by Robert and Wilma Ladd, who lived across the street from the vacant house. The Ladds had heard the noise of a car pulling up outside their house and had gone to the window to investigate. They saw three men leave the car and carry trash bags into the vacant house. Other than saying that one of the men was heavy-set, the Ladds were unable to describe the men. The car left and the Ladds called the police.

When the first police officer arrived on the scene at approximately 2:35 a.m., his attention was distracted to the end of the block where a car horn sounded. The lights of

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1. All facts herein are undisputed and appear in the Court of Appeals opinion below, except for the contents of the bill of particulars, the statements regarding the indictment, expert's testimony, and the petitioners' alibi, which were statements of fact included on appeal and not disputed.

the house then went out and the police officer saw the petitioners emerge. He stopped the men and frisked them, finding only a flashlight and knife on one and a knife on the other. After an inspection of the house revealed the materials listed above, the officers placed the petitioners under arrest for attempted arson.

Subsequently, the petitioners were indicted for possessing:

> [A]n incendiary device composed of a combination of parts including containers of flammable liquid, paper towel trailing fuses, and other combustible and incendiary material and ingredients, in an enclosed space, the combination of which was designed and intended for use as an incendiary device, and from which a device might be readily assembled . . . .

The bill of particulars more fully explained how the materials might function:

> [T]he incendiary device was composed of (1) flammable liquid of a type determined to be low and medium molecular weight hydrocarbons, one sample consistent with unleaded gasoline, one sample consistent with leaded gasoline, and one sample the composition of which was not characterized; (2) paper toweling both crumpled in a cardboard box and laying flat, extending as trailers throughout the residence; and (3) two cigarette and matchbook time delay ignition devices consisting of two bundles of each containing five filter cigarettes sandwiched between two books of matches (without covers) and secured and held in place by a rubberband.
>
> The cigarette and matchbook ignition devices, when lit, would ignite the paper toweling, propogating fire

to the gasoline containers, which, when burst, would disperse the fire throughout the premises.

At the trial, the government's expert witness testified that the device would not function as described in the bill of particulars. He then was allowed to vary from the bill of particulars and speculate as to other ways in which the device might function. The government's experts also testified that an examination of the petitioners' clothing revealed no hydrocarbons or building materials similar to those in the house. No fingerprints were found, nor were gloves.

The petitioners presented testimony that they had been next door playing cards, had run out of cigarettes and had walked to get some at the time the police arrived. The eyewitnesses were not able to identify the petitioners as the men they saw carrying the trash bags into the house. Neither they nor the police could account for or explain why only the petitioners were seen by the police when three men had entered the house. The petitioners allegedly came out of the front door, although the back door was unlocked.

The petitioners were tried on September 22, 1980. The jury was discharged after it did not reach a verdict and a second jury was called. After the second trial the petitioners were found guilty. Prior to, throughout and after the trial, the petitioners contended, among other things, that the indictment was insufficient and that the language of the National Firearms Act, especially in light of its legislative history, does not include the combination of materials described in the indictment.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit Court of Appeals, in Upholding the Conviction of the Petitioners, Misapplied the Decisions of the Ninth and Second Circuits and Held in Conflict With Decisions of Those Circuits on the Issue of What Constitutes a "Similar Device" Under 26 U.S.C. § 5845(f).

In 1968, Congress, through the Gun Control Act, broadened the definition of firearms in the National Firearms Act to include the category of "destructive device." Pub. L. 90-618, 1968 U.S. Code Cong. & Ad. News, 4410. In cases litigating the meaning of "destructive device," divergent interpretations have developed with regard to the characteristics of a device and to the nature and use of property which can be included within the term "similar device" as it is used in the definition of destructive device.

In the decision below, the Eighth Circuit held that the combination of six trash bags, each holding a container of gasoline, paper towels, tissues, cigarettes and matchbooks constitutes a destructive device which under the National Firearms Act must be identified and registered in the manner prescribed by regulation.[2] *United States v. Ragusa*, 664 F.2d 696, 698 (8th Cir. 1981). [A. A3-A4] In doing so, the Eighth Circuit, in principle at least, rejected the reasoning of the Second Circuit in *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972), which restricted the statute to "objectively identifiable weapons of war and 'gangstertype weapons' " (*Id.* at 1116) and that of the Ninth Circuit in *United States v. Peterson*, 475 F.2d 806 (9th Cir.), *cert. denied*, 414 U.S. 846, 94 S.Ct. 11, 38 L.Ed.2d 93 (1973), which stated the characteristics of an incendiary device

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2. 26 U.S.C.A. § 5842(c) (1980).

were a fuse, a primary mixture which would ignite the fuel itself, and a container for the device.[3] *Id.* at 810.

Both of these decisions follow three basic precepts of statutory construction: (1) the doctrine of *ejusdem generis*,[4] (2) the rule that criminal statutes are to be narrowly, rather than expansively construed,[5] and (3) the rule that a technical statute, such as the National Firearms Act, is to be construed technically.[6] Other Circuits have

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3. *United States v. Peterson* involved a device composed of a fuel segment of a fuser flare combined with gun powder and inserted into casing. The court stated this created a "common street do-it-yourself variety of a readily hand-thrown incendiary bomb or grenade . . . ." *Id.*, at 811. Other materials which courts have considered to be bombs have had these characteristics. *See, e.g., United States v. Cruz*, 492 F.2d 217 (2d Cir.), *cert. denied*, 417 U.S. 935, 94 S.Ct. 2649, 41 L.Ed.2d 239 (1974) (Molotov cocktail); *Robbins v. United States*, 476 F.2d 26 (10th Cir. 1973) (cylindrical cannister and glass jar); *United States v. Garr*, 461 F.2d 487 (5th Cir.), *cert. denied*, 409 U.S. 880, 93 S.Ct. 170, 34 L.Ed.2d 135 (1972) ("fire bomb filled with gasoline" fused with cloth wick); *United States v. Oba*, 448 F.2d 892 (9th Cir. 1971), *cert. denied*, 405 U.S. 935, 92 S.Ct. 979, 30 L.Ed.2d 811 (1972) (nature of the device is that it be in a single container); *United States v. Schafer*, 310 F.Supp. 1292 (E.D. N.Y. 1970) (held not a bomb because not in a single container). This technical construction is in keeping with the general dictionary definition of "bomb":

> [A]n explosive, incendiary, or gas filled container for dropping, hurtling, or setting in place to be exploded by a timing mechanism.

Webster's New Twentieth Century Dictionary, 205 (2d Ed. 1971).

4. The conclusion of the court in *Posnjak* was that since Congress had enumerated particular classes of things by listing bombs, grenades, rockets and mines, the general phrase of "similar device" must "logically be taken to mean devices similar to the preceding enumerated items in that they are articles of military ordnance . . . . 457 F.2d at 1116 (citing S.Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968). *See, also, United States v. Oba*, 448 F.2d 892, 900-01 (9th Cir. 1971) (Browning, J., dissenting), *cert. denied*, 405 U.S. 935, 92 S.Ct. 979, 30 L.Ed.2d 811 (1972).

5. *See United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

6. "The National Firearms Act is drafted in technical language . . . . It must be construed, therefore, technically." *United States v. Posnjak*, 457 F.2d at 118 (quoting *United States v. Collier*, 381 F.2d 616 (6th Cir. 1967) and *United States v. Lamb*, 294 F.Supp. 419 (E.D. Tenn. 1968)).

strayed so far from the narrow construction of the definition of "destructive device" that their decisions can be read to support the conclusion that any destructive device with no valid social purpose is a firearm, even though it is not similar to a bomb, grenade, rocket, missile or mine. The Eighth Circuit has furthered this departure.

While not expressly accepting the Ninth Circuit requirements of a fuse, primary mixture, fuel and a container for the device (664 F.2d at 699) [A. A5-A6], the Eighth Circuit determined that the combination had these characteristics (*Id.*). [A. A6-A7] However, the Court of Appeals for the Eighth Circuit expressed the opinion that all that is necessary is a container for the fuel (664 F.2d at 700) [A. A6-A7], even though the Ninth Circuit had required a container not just for the fuel but for the entire device (*United States v. Peterson*, 475 F.2d at 810). The Ninth Circuit requirement is an extension of the generally recognized characteristic that bombs, grenades, rockets and missiles can be thrown, hurled, or set in place. In fact, Congress, in the Explosive Control Act, defined a destructive device by saying it included devices which "can be carried or thrown by one individual acting alone." 18 U.S.C. § 232(5).[7]

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7. (5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and (ii) can be carried or thrown by one individual acting alone. (18 U.S.C. § 232(5)).

The definition, enacted in 1970, was part of an act designed to reduce "the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials." Act of Oct. 15, 1970, P.L. 91-452, Title XI, § 1101, 84 Stat. 952. The Explosive Control Act came two years after the enactment of the National Firearms Act and the Omnibus Crime Control

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The holes in the floor of the house where police found the trash bags, paper towels, and other items were recognized as an important element of the device. (Record, p. 299). Hence, the determination below that the device met the Ninth Circuit's requirement of a container required a very liberal construction of the Ninth Circuit holding and of the National Firearms Act. The only way to determine that the device in this case was in a container is to consider the entire house as the device similar to a bomb, grenade, missile, rocket or mine. This liberal judicial expansion has created a statute so vague that it violates due process.[8] Based on the Eighth Circuit opinion, a person of ordinary intelligence would be expected to know

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Footnote continued—

and Safe Street Act which contain almost identical definitions of destructive device. While the Explosive Control Act states it is not to "be construed as modifying or affecting any provision of" the two 1968 acts (Act of Oct. 15, 1970, P.L. 91-452, Title XI, § 1101, 84 Stat. 952), the later Act is enlightening as to the technical meaning of the term destructive device. In the Explosive Control Act the definition closely parallels the definition of the National Firearms Act but is more explicit.

8. It was held in *United States v. Morningstar*, 456 F.2d 278 (5th Cir. 1972), that, "On its face, the definition of a destructive device gives fair notice to a person of ordinary intelligence that it includes any combination of parts intended to be used as a bomb or weapon and from which a bomb or weapon can be readily assembled." *Id.*, at 281.

With references to a Molotov cocktail, the court in *United States v. Ross*, 458 F.2d 1144 (5th Cir.), *cert. denied*, 409 U.S. 868, 93 S.Ct. 167, 34 L.Ed.2d 118 (1972), held the statute was not so vague as to be unconstitutional. The holding, however, was based on the dictionary definition of a Molotov cocktail as a crude hand grenade. Thus, "a person may be charged with knowledge of its similarity to a grenade." *Id.*, at 1145.

However, the materials involved in this case are not similar to a bomb, grenade, missile, rocket or mine. To expand the statute to include within its definition a device which is not objectively included would mean the "on its face" analysis of *Morningstar* and the "grenade being similar to a grenade" analysis of *Ross* would not apply. Rather, the judicial expansion condemned in *Bouie v. Columbia*, 378 U.S. 347, 352-53, 84 S.Ct. 1697, 12 L.Ed.2d 894, 899 (1964), would be occurring. The defendants' due process rights would be violated.

that a house in which there were containers of gasoline connected by paper towels and a starting device constituted a firearm which he must register. The statute does not give such notice.

Despite the lack of statutory notice, the Eighth Circuit expanded the statute by differing with the Ninth Circuit's definition of a destructive device, and failing to address the Second Circuit's conclusion that the "last phrase [similar device] must logically be taken to mean devices similar to the preceding enumerated items in that they are articles of military ordnance . . . ." *United States v. Posnjak*, 457 F.2d at 1116 (citing S.Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)). The Eighth Circuit relied on the fact the Second Circuit recognized that a "similar device" could be homemade. 457 F.2d at 1119 and n. 10, 1120. *See, also, United States v. Bubar*, 567 F.2d 192, 201 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977). However, what the Eighth Circuit ignored was that the Second Circuit, in recognizing that a device could be homemade, did not dispense with the requirement that the device must be similar to a bomb, grenade, missile, rocket or mine. The Eighth Circuit did not recognize this or attempt to distinguish the Second Circuit opinion with regard to the nature of the device.

Rather, the Eighth Circuit examined the legislative history of the National Firearms Act[9] for an indication

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9. In *Posnjak*, the court discussed the legislative history:

> Congressional concern, when it passed these statutes, was to halt the growing number of crimes in which guns were used to inflict or threaten bodily harm. Congress found it a matter of national concern to make firearms less readily available to juveniles, criminals, addicts, mental defectives, armed groups who would supplant public authorities, and others considered likely to put them to illegitimate uses. S.Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968). The weapons primarily aimed at were guns, espe-

(Continued on following page)

of whether Congress intended to exclude firearms which are used to damage property. The search of the legislative cerned with any particular crime (664 F.2d at 699) [A. A5], is an apparent attempt by the Eighth Circuit to distinguish an apparent attempt by the Eighth Circuit to distinguish *United States v. Birchfield,* 486 F.Supp. 137 (M.D. Tenn. 1980). In that decision the court, in construing the definition of explosive or incendiary device in 18 U.S.C. § 232(5), refused to say the device described in the indictment, throwing lighted paper on a gasoline-soaked floor, was an incendiary device because "the indictment is a very common means of arson, and in the absence of clear statutory language or a compelling legislative history, this court must assume that Congress . . . did not intend to exert federal jurisdiction over this traditional area of state concern." 486 F.Supp. at 138-39.

The Eighth Circuit cites no legislative history of the National Firearms Act which indicates that Congress intended to exert jurisdiction over arson-type cases. In fact, the history it cites does just the opposite; it indicates Congressional concern with crimes against people. 664

Footnote continued—

cially cheap handguns being imported from abroad, surplus military weapons, unfit for sporting purposes, being dumped in this country, and rifles and shotguns, "the chosen weapons of the sniper." S.Rep. No. 1501, *supra,* at 24; 114 Congress Rec. 26716-17 (1968) (remarks of Senator Dodd). The category of "destructive devices" was intended to cover the military-type weapons—mines, grenades, bombs and large-caliber weapons, such as .zookas, mortars, and anti-tank guns. S.Rep. No. 1501, *supra,* at 25, 30; 114 Cong. Rec. 26898, 26900, 27133 (1968). To the other groups of weapons regulated by the National Firearms Act, "gangster-type weapons," which before revision meant mainly machine-guns, Congress added short-barreled shotguns and short-barreled rifles, declaring that such weapons have no appropriate sporting or other lawful use. S.Rep. No. 1501, *supra,* at 28; 114 Cong. Rec. 26896 (1968) (remarks of Senator Hruska).

457 F.2d at 1115.

F.2d at 698). [A. A6] The Eighth Circuit circumvents the lack of "compelling" legislative history by distinguishing *Birchfield* on the ground that the alleged device in this case was not a common means of arson as was the alleged device in *Birchfield*. This circumvention of the issue does not cure the conflict with the other opinions or the failure to meet the requirement that there be a clear indication that Congress intended to extend federal jurisdiction over an area which has traditionally been a state concern.

Nor does the Eighth Circuit find a basis in the legislative history to ignore the Second Circuit's holding in *Posnjak*. Instead, the Eighth Circuit ultimately grasps at the second prong of the Second Circuit's test: "whether all components, once connected, in however crude a fashion, [formed] a *new entity* with destructive capabilities of its own and without a legitimate purpose." 664 F.2d at 700 [A. A7] (*quoting United States v. Bubar*, 567 F.2d 192, 201 (2d Cir.), *cert denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977)) (emphasis added by the Eighth Circuit). However, the Second Circuit has used this test only if it has first determined that the physical characteristics of the device are similar to a bomb, grenade, missile, rocket or mine.[10] The Eighth Circuit did not, however, discuss whether the device in this case possessed such similarities.

Consequently, the Eighth Circuit has adopted a reading of 26 U.S.C. § 5845(f) which is inconsistent with the holdings of the Second and Ninth Circuits. While the Eighth Circuit does not expressly reject the holdings of the other Circuits, it does not apply those holdings, or at least misapplies the holdings, and ultimately reaches a conclusion

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10. The Second Circuit in *United States v. Posnjak*, stated, "A device which as an objective matter does not fall under the specific categories in the definitions is not brought within this coverage by the owner's intent." 457 F.2d at 1120.

which is inconsistent with the determinations of the other Circuits.

These conflicts, especially in light of the extremely liberal judicial expansion of the statute and the consequent violation of due process, justify the grant of certiorari to review the judgment below.

2. The Eighth Circuit's Holding on the Issue of Whether a Bill of Particulars Can Cure a Defective Indictment Conflicts With Its Own Precedent and With Decisions of the District of Columbia and Third Circuit Courts of Appeal.

The Eighth Circuit in its decision below concluded that the alleged device did have a fuel, a fuse, a starting mechanism and a container for the device (664 at 699-700). [A. A7] (As already discussed, the Eighth Circuit actually applied a different test since it did not require a container for the entire device.) Thus, the test of *United States v. Peterson*, 475 F.2d 806, 810 (9th Cir.), *cert. denied*, 414 U.S. 846, 94 S.Ct. 11, 38 L.Ed.2d 93 (1973) was, at least in the Eighth Circuit's opinion, met.

However, the only way the Eighth Circuit could have concluded all of the components were present is by curing a defective indictment with the bill of particulars. The indictment listed the presence of a fuel and a fuse but did not indict the petitioners for possession of the other items needed to meet the Ninth Circuit's definition. The indictment stated the device consisted of "containers of flammable liquid, paper towel trailing fuses, and other combustible and incendiary ingredients . . . ."

Thus, the third feature of a destructive device as required by the Ninth Circuit, a primary mixture to ignite the fuel, was not specified in the indictment. The cigarette

and matchbook igniting devices were mentioned only in the bill of particulars. Despite this, the Eighth Circuit repeatedly included the starting mechanism as part of the device and cited its presence when concluding all of the characteristics specified in the Ninth Circuit test were present.

This conclusion was not only erroneous because the indictment did not describe a container for the entire device (not just the fuel), the fourth requirement of the Ninth Circuit's test, but also because the indictment did not mention the third element, the starting device. Without either the third or fourth element present, the indictment did not charge an offense. [A. A3, A7-A8]

The only way to cure this defect is to include the charges in the bill of particulars in the indictment. (This is what the Eighth Circuit had to do even though it did not explicitly state it was doing so.)

This practice is in direct conflict with the decisions of other Circuits which have held that a bill of particulars can never cure a defective indictment. *United States v. Nance,* 533 F.2d 699 (D.C. Cir. 1976); *United States v. Critchley,* 353 F.2d 358 (3d Cir. 1965); *United States v. Mandel,* 415 F.Supp. 997 (D.C. Md. 1976); *United States v. Dahir,* 275 F.Supp. 83 (D.C. Minn. 1967).

Moreover, the decision not only conflicts with decisions of other Circuits, it also conflicts with an earlier Eighth Circuit opinion, *Floren v. United States,* 186 F. 961 (8th Cir. 1911). In that opinion, the Eighth Circuit stated that an indictment must contain averments of the facts which constitute the offense, and concluded that "[w]here an indictment is . . . fatally defective . . . a bill of particulars cannot cure it." *Id.* at 964.

The Eighth Circuit's departure from its previous holding and the holdings of the other Circuits alters a well-established rule of law which is an important protection for the criminal defendant. Thus, the conflict is significant and justifies the grant of certiorari to review the judgment below.

3. The Decision Below Conflicts With the Decisions of the Courts of Appeals for the Sixth, Seventh and District of Columbia Circuits on the Issue of What Is Necessary to Prove Possession.

The decisions below determined the petitioners' presence at the house when the police arrived was sufficient proof of possession of the alleged firearm to support the conviction (664 F.2d at 701). Wilma and Robert Ladd testified they saw three men enter the house. Beyond saying that one man was heavy-set, the Ladds could not describe the men. Wilma Ladd testified that neither petitioner was the heavy-set man she saw enter the house. But the Eighth Circuit relied on the fact that the Ladds saw no one else enter the house. In the decision, no explanation is offered as to why this is important when the Ladds could not explain why three men entered and only two emerged; when the entire device, including pounding holes in the attic, could not have been set by three men within the five minutes between the time they were seen entering the house and the time the police arrived; and why no evidence of hydrocarbons was found on the petitioners despite the fact they had allegedly carried gasoline into the house.

The decision below relies on the fact that circumstantial evidence may be sufficient to support a finding of possession (664 F.2d at 701). [A. A9] Yet, no mention is made that the circumstantial evidence only supports pres-

ence at the scene and that other circuits have rejected mere presence as proof of possession of a firearm. *United States v. Birmley,* 529 F.2d 103 (6th Cir. 1976); *United States v. Gates,* 491 F.2d 720 (7th Cir. 1974); *United States v. Holland,* 445 F.2d 701 (D.D.C. 1971). Also, this court has held that mere presence even at the scene of the crime is insufficient to prove aiding and abetting. *United States v. Williams,* 341 U.S. 58, 71 S.Ct. 595, 95 L.Ed. 747 (1951).

The Sixth Circuit, in *United States v Birmley*, 529 F.2d 103 (6th Cir. 1976), held that the evidence did not support the conviction of a person who was a passenger in a car in which there were unregistered firearms. "Presence alone cannot show the requisite knowledge, power or intention to exercise control over the unregistered firearm." *Id.* at 107-08. Under similar facts the Seventh Circuit reached the same decision. *United States v. Gates,* 491 F.2d 720 (7th Cir. 1974).

These cases were relied on in *United States v. Holland,* 445 F.2d 701 (D.C. Cir. 1971), which did not deal with firearm possession but did hold that presence in an apartment in which there were illegal items was not sufficient to prove constructive possession. The court stated that it should not be imputed that someone in another's home had dominion and control over a thing found in the home. *Id.* at 703. "To do so would be utter speculation." *Id.*

The Eighth Circuit has, however, endorsed this utter speculation and stated that the circumstantial evidence of presence is sufficient to support a conviction of possession of an unregistered firearm. The decision below upholds the determination of possession even though there is no evidence, either physical or circumstantial, that Ragusa and Caresio had the requisite knowledge, power or intention to exercise control over unregistered firearms.

In doing so the Eighth Circuit's opinion conflicts with the decisions of the United States Court of Appeals for the Sixth and Seventh Circuits and the District of Columbia. The conflict not only has impact on cases under the National Firearms Act, but creates a precedent for all crimes in which possession is an element. Thus, the conflict is significant and justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1076

United States of America,
Appellee,

v.

Joseph Ragusa and John Caresio,
Appellants.

Appeal from the United States District Court for the
Western District of Missouri.

Submitted: September 14, 1981
Filed: December 1, 1981

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

HENLEY, Circuit Judge.

Defendants appeal their convictions under the National Firearms Act, 26 U.S.C. § 5801 *et seq.*, for possession of an unregistered firearm in violation of § 5861(d). We affirm the judgment of the district court.[1]

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1. The Honorable Howard F. Sachs, United States District Judge, Western District of Missouri.

The essential facts are as follows. Sometime before 2:30 a.m. on June 6, 1979, Wilma and Robert Ladd heard a car stop outside their home and, going to the window, observed several men, one heavyset, entering a vacant house across the street carrying trash bags. Mr. Ladd called the police at 2:30 a.m., then returned to the window to watch until the police arrived. The car drove off, leaving the men inside the lighted house. Officer Kinder, responding to the call, arrived at approximately 2:35 a.m. As he approached the house, his attention was diverted to the corner of the block by the sound of a car honking. When he looked back at the house, he noticed that the lights had been turned off, and saw defendants Ragusa and Caresio, a heavyset man, emerging through the front door. Officer Kinder immediately stopped and frisked the defendants, then left them with his back-up officer while he went to look inside the house, where he observed a plastic container filled with gasoline suspended from a wooden window frame and paper towels trailing through the house. He called for assistance from the Bomb and Arson Unit and arrested defendants for attempted arson.

An investigation of the house revealed six trash bags, each holding a five-gallon container of gasoline, suspended in various locations and connected by overlapping paper towels trailing throughout the house. Several holes had been knocked in the ceiling and the gas pipe behind the kitchen stove was broken, although there was no gas in the pipe. A bottle of flammable liquid was found on a table along with a box containing tissue paper and several matchbooks with the covers removed and fastened to some cigarettes with rubberbands.

Ragusa and Caresio were indicted for unlawfully and knowingly possessing a firearm, o: more specifically, a

destructive device, as defined in 26 U.S.C. § 5845(f).[2] The trial court declined to rule on the government's pretrial motion to determine the sufficiency of the indictment charging possession of a destructive device and reserved the issue for post-trial determination. The case proceeded to trial on September 22, 1980. After failing to reach a verdict, the jury was discharged and the case was retried on October 21, 1980. The second jury returned a verdict of guilty. In denying defendants' various post-trial motions for judgment of acquittal, arrest of judgment, and new trial, the trial court found that the indictment was sufficient and that there was sufficient evidence to support the jury's verdict.

Defendants' primary contention in their post-trial motions and on appeal is that the collection of items found

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2. 26 U.S.C. § 5845(f) provides:

The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

in the house does not constitute a destructive device within the meaning of the statute. It is their position that the language of the statute and its legislative history exclude from coverage the device here in question. This issue is a difficult one and was of some concern to the trial judge, who stated in his order of November 18, 1980 that "[i]n effect, the government's evidence shows attempted arson. The Court is doubtful that Congress intended prosecutions of the type here involved, under the registration statute in question." Nevertheless, the district court concluded that the "prosecution falls within the literal meaning of the general terms of the statute." *See United States v. Bubar*, 567 F.2d 192, 200-01 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977). We are inclined to agree.

The legislative history of the 1968 Gun Control Act, which amended the National Firearms Act by adding "destructive device" to the definition of firearm, 26 U.S.C. § 5845(a)(8), indicates that Congress was attempting to stem the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." 1968 U.S. Code Cong. & Ad. News 4412. *See United States v. Greer*, 588 F.2d 1151, 1155 (6th Cir.), *cert. denied*, 440 U.S. 983 (1979); *United States States v. Posnjak*, 457 F.2d 1110, 1113 (2d Cir. 1972); *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971), *cert. denied*, 405 U.S. 935 (1972) (dissenting opinion). Although the crimes specifically mentioned in the House Report—for example, murder, aggravated assault, and robbery—are generally directed towards persons rather than property, there is no indication that crimes involving firearms and directed toward property are excluded, and the courts have not so limited the statute's application. *See, e.g., United States v. Bubar, supra* (destructive device used to commit arson); *Langel v. United States*, 451 F.2d 957 (8th Cir. 1971) (destructive

device used to destroy vehicles). In addition, the statute's emphasis on unlawful possession, rather than use, of a firearm further suggests that the possessor need not use the firearm in the commission of any particular sort of crime to be in violation of the statute. 26 U.S.C. § 5861 (d). *See United States v. Greer, supra* (destructive device discovered being shipped via United Parcel Service); *United States v. Peterson,* 475 F.2d 806 (9th Cir.), *cert. denied,* 414 U.S. 846 (1973) (destructive device intended to burn haystacks); *United States v. Morningstar,* 456 F.2d 278 (4th Cir.), *cert. denied,* 409 U.S. 896 (1972) (destructive device concealed on college campus); *United States v. Harflinger,* 436 F.2d 928 (8th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971) (destructive device found in trunk of car).

Having found no clear legislative intent to exclude from the registration requirements firearms used in perpetration of arson or attempted arson,[3] the issue becomes whether the combination of items in the present case falls within the statutory definition of destructive device. 26 U.S.C. § 5845(f) provides in pertinent part that a destructive device includes an "(1) . . . incendiary . . . (A)

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3. Defendants attempt to analogize the definition of destructive device in § 5845(f) to the definition of "explosive or incendiary device" in 18 U.S.C. § 232(5), which was found by the district court in *United States v. Birchfield,* 486 F.Supp. 137 (M.D. Tenn. 1980), to exclude throwing lighted paper onto a gasoline-soaked floor. The court in that case noted that "the form of destruction described in . . . the indictment is a very common means of arson, and in the absence of clear statutory language or a compelling legislative history, this Court must assume that Congress . . . did not intend to exert federal jurisdiction over this traditional area of state concern." 486 F.Supp. at 138-39. However, we are not dealing in this case with a "very common means of arson," but with an attempt to destroy property by means of a complex apparatus. In addition, we note that the defendants in *Birchfield* were charged under the section of the Explosives Control Act codified at 18 U.S.C. § 844(i), which emphasizes unlawful use, rather than possession, of explosive or incendiary devices.

bomb, . . . or (F) similar device; . . . and (3) any combination of parts . . . intended for [conversion] into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled."

Defendants urge that the statute, as a criminal provision, should be construed narrowly. *See United States v. Bass*, 404 U.S. 336, 347 (1971). Noting that the statute does not define bomb, they offer the following dictionary definition from Webster's New Twentieth Century Dictionary (2d ed. 1971): "[A]n explosive, incendiary, or gas filled container for dropping, hurling, or setting in place to be exploded by a timing mechanism," and also refer tc *United States v. Peterson, supra*, wherein the characteristics of an incendiary device were listed as "a fuse, a priming mixture [to ignite] the main fuel, the fuel itself and a container for the device." 475 F.2d at 810. Defendants further challenge the construction of the statute which focuses on the antisocial purpose of a device rather than on its objective qualities. *See United States v. Morningstar*, 456 F.2d at 280-81; *United States v. Ross*, 458 F.2d 1144, 1145-46 (5th Cir.), *cert. denied*, 409 U.S. 868 (1972); *United States v. Oba*, 448 F.2d at 894, *cited in Langel v. United States*, 451 F.2d at 962.

We need not determine the precise boundaries of the statutory definition, however, because we find that the device described by the prosecution falls within the statute and indeed is within the construction urged by defendants. Although the amendment adding "destructive device" to the definition of firearm was perhaps primarily aimed at military-type weapons, *see United States v. Posnjak*, 457 F.2d at 1116; *United States v. Oba*, 448 F.2d at 897 (Browning, J., dissenting), it appears that "a homemade incendiary product also might be embraced within the

statute's definition." *United States v. Bubar*, 567 F.2d at 201. *See United States v. Peterson*, 475 F.2d at 810. As the trial judge noted, a good example is a Molotov cocktail which has consistently been held to fall within the meaning of destructive device. *See, e.g., United States v. Tankersley*, 492 F.2d 962 (7th Cir. 1974); *United States v. Ross, supra; United States v. Banks*, 368 F.Supp. 1245 (D. S.D. 1973). The device in the present case, albeit crudely constructed, possessed all the physical components of a device similar to a bomb. The main fuel, of course, was the gasoline, contained in the several trash bags suspended throughout the house. The paper towels formed a fuse which led to the igniter, or trigger, consisting of the matchbooks fastened to the cigarettes. The bottle of flammable liquid was apparently intended to function as the primary mixture.

Nor are we persuaded by defendants' argument that the device in the present case fails for lack of a single container. *United States v. Peterson*, 475 F.2d at 810. Common sense indicates that the fuel need not be housed in only one container. It cannot be seriously contended that if defendants had connected only one bag of gasoline to a paper towel fuse, this would constitute a destructive device whereas several containers so connected would not. It seems more probable that the concept of a container is included to distinguish a situation where, for example, gasoline is simply spilled on the floor and ignited. *Cf. United States v. Birchfield*, 486 F.Supp. 137 (M.D. Tenn. 1980) (throwing lighted paper on gasoline-soaked floor did not constitute an incendiary device as defined in 18 U.S.C. § 232(5)). The question is whether all components once "connected, in however crude a fashion, [formed] A *new entity* with destructive capabilities of its own and without a legitimate purpose." *United States v. Bubar*,

567 F.2d at 201. As stated earlier, the combination of items connected together in the present case possessed the physical elements of a device similar to a bomb, and clearly had no other purpose than to destroy the house in which it was located.

Finally, defendants argue that the device as constructed could not have functioned as intended and was therefore not a destructive device. We note, however, that the testimony was apparently conflicting on this point, and, at any rate, it is not necessary that the device actually function as intended. *United States v. Evans,* 526 F.2d 701, 707 (5th Cir.), *cert. denied,* 429 U.S. 818 (1976); *United States v. Rushcamp,* 526 F.2d 1380, 1382 (6th Cir. 1975).

In connection with their contention that the items found in the house did not constitute a destructive device, defendants object to portions of the jury instructions defining destructive devices as including stationary as well as movable items and also as including "[a]ny article or device composed of a combustible material capable of producing sufficient heat to destroy property of any kind, and having components designed to ignite that combustible material." As for the distinction between movable and stationary devices, we find no basis for limiting the definition of destructive device to only those devices capable of being carried or thrown.[4] Defendants' own proposed

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4. Again, defendants attempt to analogize § 5945(f) to 18 U.S.C. § 232(5). *See* n.3 *supra.* Section 232(5) defines an explosive or incendiary device as follows:

> (5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable

(Continued on following page)

definition allows a bomb to be "set in place," as was the device in the present case. *See United States v. Bubar, supra.* With respect to the portion of the instruction quoted above, we note that this portion was patterned after an instruction approved by the Ninth Circuit in *United States v. Peterson, supra,* and further that the device, as stated, was covered by defendants' proffered definition.

Defendants next contend that there was insufficient evidence to support a finding that defendants were in possession of the device. Admittedly, this finding was based on circumstantial evidence. However, the trial court, in denying defendants' motion for acquittal, noted that circumstantial evidence could support a finding of possession. *Langel v. United States,* 451 F.2d at 960-61. The Ladds observed men entering the house carrying trash bags and watched the silhouettes moving about inside the house. Mr. Ladd testified that he saw no one else enter or leave the house during the short time before the police arrived, and defendants were seen leaving through the front door and were immediately stopped.

We therefore conclude that the trial court properly found the indictment sufficient to charge possession of a destructive device and that there was sufficient evidence to support the jury's verdict.

The next issue raised by defendants on appeal is the failure of the trial court to grant more than a one day continuance before the commencement of their second trial. Defendants requested a continuance because their lead

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Footnote continued—

liquid or compound, and (ii) *can be carried or thrown by one individual acting alone.*

Id. (Emphasis added.) A careful reading of this section reveals that § 232(5) is not limited to devices capable of being carried or thrown, but rather "includes" such devices.

counsel had withdrawn. In granting a one day continuance, however, the trial judge noted that defendants' two other attorneys had actively engaged in trial preparation, one of them throughout, and that no real need had been shown by defendants warranting a longer continuance. We cannot say that the trial judge abused his discretion in granting a continuance of only one day.

We have carefully considered defendants' other assertions of error based on the reference of the government's witness to the combination of items as a "device," the alleged variance from the bill of particulars, and the court's instruction regarding possession, and find them equally without merit.

For the foregoing reasons, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1076
September Term, 1981

United States of America,
Appellee

vs.

Joseph Ragusa and John Caresio,
Appellants

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 28, 1982

Opposition

Office - Supreme Court, U.S.
FILED
JUN 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1793

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH RAGUSA AND JOHN CARESIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an assembly of materials found in a vacant house, including trash bags holding containers of gasoline, trails of paper towels, and bundles of matchbooks fastened to cigarettes, constituted a "destructive device," as defined in 26 U.S.C. 5845(f).

2. Whether the evidence was sufficient to support a finding that petitioners were in possession of the destructive device.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1793

JOSEPH RAGUSA AND JOHN CARESIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 664 F. 2d 696.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981. A timely petition for rehearing was denied on January 28, 1982 (Pet. App. A11). The petition for a writ of certiorari was filed on March 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners were convicted of possessing a destructive device, in violation of 26 U.S.C. 5861(d) and 5871.[1] Petitioner Caresio was sentenced

[1] In a previous trial, the jury was unable to reach a verdict (Pet. App. A3).

to four years' imprisonment. Petitioner Ragusa was sentenced under 18 U.S.C. 4205(c), which provides for imposition of the maximum sentence, subject to modification after the Director of the Bureau of Prisons has studied the defendant and reported his findings and recommendations to the court. Accordingly, petitioner Ragusa was sentenced to ten years' imprisonment and fined $10,000.

The evidence at trial established that, sometime before 2:30 a.m. on June 6, 1979, in Kansas City, Missouri, Wilma and Robert Ladd heard a car stop outside their house. From the window they saw three men get out of the car and enter a vacant house across the street, carrying bulging trash bags (Tr. 11-13, 35-37). Robert Ladd suspected arson and called the police at 2:30 a.m. He then returned to the window to watch until the police arrived (Tr. 14, 37-38). The car drove off, leaving the men inside the lighted house; Mr. Ladd could see them walking around in the front room (Tr. 38).

Police Officer Kinder arrived at 2:35 a.m. As he parked his car, he heard the sound of a car accelerating at the corner of the block, as well as four or five blasts of a horn (Tr. 85). When he looked at the house, he saw that the lights had been turned off, and he saw petitioners come out the front door of the house (Tr. 87-88). Officer Kinder stopped and frisked the two men, left them with his back-up unit, and looked inside the house (Tr. 90-92). There he saw a liquid-filled plastic container that had been hung from a window frame and paper towels trailing through the house. He arrested petitioners for attempted arson and called for assistance from the Bomb and Arson Unit (Tr. 92-93).

An investigation of the house revealed that six trash bags had been suspended on walls throughout the house. Each bag contained a five-gallon container of gasoline. Overlapping paper towels were trailed through the house, connecting the gasoline containers (Tr. 183-184, 194-200, 204, 211-

212; Pet. App. A2). Several holes had been made in the ceiling near the suspended bags of gasoline, and a gas pipe behind the kitchen stove had been broken, although no gas was in the pipe (Tr. 185-187, 205-206; Pet. App. A2). There was a bottle of flammable liquid and a box on a table in the living room. The box contained tissue and several matchbooks that were fastened to cigarettes with rubber bands (Tr. 183-185, 217, 258-259; Pet. App. A2).

An explosives expert from the Bureau of Alcohol, Tobacco, and Firearms who had examined pictures of the materials in the house (Tr. 285-290, 295) testified that the only purpose of this combination of items was to ignite and destroy property. He described in detail how the placement of the various parts was designed to function together in starting and spreading a fire (Tr. 294-300, 327-329).

Petitioners offered an alibi defense through the testimony of several witnesses, who said that petitioners had been playing poker in the house next door and that petitioners were arrested while on their way to buy cigarettes at a nearby store (Tr. 368-372, 454-460, 475-484). Neither petitioner testified.

ARGUMENT

1. Petitioners' primary contention (Pet. 7-14) is that the assemblage of materials found in the vacant house is not a "destructive device," as defined in the National Firearms Act, 26 U.S.C. 5845(f), because the materials were not in a container.[2] They allege a conflict between the Eighth Circuit's interpretation of the statute in this case and that of the

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[2]26 U.S.C. 5845(f), which does not expressly require use of a "container," provides:

> The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce,

Ninth and Second Circuits. This argument is without merit. The holding of the court below is consistent with the language and history of the statute. Nor is there any conflict between the holding of the court in this case and that of any other court of appeals.

The court of appeals here first reviewed the legislative history of the 1968 Gun Control Act, which amended the National Firearms Act by adding "destructive device" to the definition of regulated firearms. 26 U.S.C. 5845(a)(8). The court noted that Congress expressed a concern for the growing use of firearms in violent crime. Although the crimes specifically mentioned were generally those directed at persons rather than property—crimes such as murder, robbery and assault—the court observed that there was no indication that other types of violent crimes involving firearms were meant to be excluded. And it cited a number of cases demonstrating that the courts have not limited the

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(E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed or redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

statute according to the type of crime involved (Pet. App. A4-A5). Petitioners complain that the court of appeals failed to demonstrate that Congress intended to assert jurisdiction over arson cases (Pet. 12-13); there is, however, nothing in the language of the statute that suggests that the statutory prohibitions regarding "destructive devices" would be nullified if such a device were employed for arson. 26 U.S.C. 5845(f); 26 U.S.C. 5861.[3]

After determining that the statute did not exclude firearms used in perpetration of arson, the court went on to determine whether the combination of items in this case satisfied the statutory definition of destructive device. It concluded that the device, "albeit crudely constructed," possessed all the characteristics of a device "similar" to a bomb, and that its homemade construction did not remove it from the coverage of the statute, citing a number of cases that have held that Molotov cocktails and other types of homemade bombs were destructive devices (Pet. App. A7). See, *e.g.*, *United States* v. *Bubar*, 567 F. 2d 192, 201 (2d Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Tankersley*, 492 F. 2d 962 (7th Cir. 1974); *United States* v. *Peterson*, 475 F. 2d 806 (9th Cir.), cert. denied, 414 U.S. 846 (1973); *United States* v. *Rose*, 458 F. 2d 1144, 1145 (5th Cir.), cert. denied, 409 U.S. 868 (1972).

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[3]Petitioners rely on *United States* v. *Birchfield*, 486 F. Supp. 137 (M.D. Tenn. 1980), in which the court refused to find that throwing lighted paper on a gasoline-soaked floor constituted use of an incendiary device, as defined in 18 U.S.C. 232(5). The court noted that this was a very common means of arson and that Congress had given no indication that it intended to assert federal jurisdiction over this area. 486 F. Supp. at 138-139. *Birchfield*, of course, did not involve the statute at issue in this case. Moreover, spilled gasoline does not appear to satisfy any definition of "device." As the court of appeals noted, this case by contrast involves a very complex apparatus (Pet. App. A5 n.3).

Petitioners claim (Pet. 9-11) that the court in this case departed from the construction of the term "destructive device" established by the Ninth Circuit in *United States* v. *Peterson, supra*. Pointing to four elements listed in *Peterson*, a fuse, a primary mixture for igniting the fuel, the fuel, and a container for the device, petitioners argue that the court in this case either failed to require that the device be in a container or so expanded the notion of what could be considered a container as to render the statute impermissibly vague. A fundamental error in this argument, however, is petitioners' misreading of the Ninth Circuit's holding in the *Peterson* case.

Although the assemblage of materials held to be a destructive device in *Peterson* did include a container, the court there did not suggest that a container for the device must be present for it to fall within the statute's definition. Nor, indeed, did the court require any of the four characteristics noted by petitioners as essential ingredients of a "destructive device." These elements were mentioned in the court's opinion when it described the testimony of a government witness who stated that the device at issue there, a flare casing with gunpowder and cotton rope added to its fuel, "had all of the characteristics of any conventional incendiary device." 475 F. 2d at 810. The court did not, however, incorporate these elements into a definition of a destructive device. Instead, it concluded from a reading of the statute and legislative history that the device there involved, which resembled a Molotov cocktail, satisfied the statute's definition of "destructive device" because it was "similar to * * * an incendiary bomb or grenade" (26 U.S.C. 5845(f)(1)(F)). 475 F. 2d at 811. The court further noted that a "combination of parts" designed to produce a destructive device and from which a destructive device could be readily assembled would satisfy the statutory requirements (26 U.S.C.

5845(f)(3)). 475 F. 2d at 811. Nothing in the court's opinion in the present case is inconsistent with the holding in *Peterson*.[4]

Petitioners contend (Pet. 11, 13) that in *United States* v. *Posnjak*, 457 F. 2d 1110, 1116 (2d Cir. 1972), the Second Circuit interpreted the statute narrowly to include only "objectively identifiable weapons of war and 'gangster-type weapons' " or similar devices. Petitioners do not dispute the Second Circuit's observation that similar devices can be "homemade" (*United States* v. *Bubar, supra*, 567 F. 2d at 201) but contend that the court here failed to consider whether the device was similar to a bomb, grenade, missile, rocket or mine. On the contrary, the court specifically found that "[t]he device in the present case, albeit crudely constructed, possessed all the physical components of a device similar to a bomb" (Pet. App. A7). As explained by the government's expert (Tr. 294-300, 327-329), the device in this case was designed and intended to operate like an incendiary bomb. It had no legitimate purpose; it was constructed solely for the purpose of destroying property. Given the amount of gasoline involved, its potential for destruction was obviously great. Thus, in all material respects the device in this case was not substantially different from a conventional incendiary bomb; its visual

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[4]Indeed, as the court of appeals correctly reasoned (Pet. App. A7), it would defy common sense to require that the device be housed in a single container, so that the use of only one bag of gasoline would satisfy the statute, while the use of several such bags would not. The court suggested that the container concept might be useful to distinguish the situation where, for example, gasoline is merely spilled out and ignited; there, no "device" can be said to have been assembled. Cf. *United States* v. *Gere*, 662 F. 2d 1291, 1295-1296 (9th Cir. 1981); *United States* v. *Birchfield*, 486 F. Supp. 137 (M.D. Tenn. 1980) (throwing lighted paper on gasoline-soaked floor did not constitute use of an incendiary device as defined in 18 U.S.C. 232(5)).

appearance is beside the point. Petitioners have cited nothing to suggest that Congress' concern was with form rather than the operation and destructive potential of the device.[5]

2. Petitioners also challenge (Pet. 16-18) the sufficiency of the evidence offered to prove possession of the destructive device. They claim that their presence in the house was not enough to demonstrate the dominion and control necessary to establish constructive possession, and that the decision below upholding the finding of possession conflicts with other decisions from the Sixth, Seventh, and District of Columbia Circuits.

The court of appeals here recognized that the finding of possession rested on circumstantial evidence, but correctly noted that circumstantial evidence alone can support such a finding. Pet. App. A9; see *Langel* v. *United States*, 451 F. 2d 957, 960-961 (8th Cir. 1971). Petitioners were seen leaving a vacant house at 2:30 in the morning, and the destructive device was found immediately thereafter. Three men had been seen entering the house sometime before, carrying bulky trash bags, and the witnesses watched the silhouettes moving around inside the house. They saw no one else enter or leave the house before the police arrived. In light of these facts, a finding that the men who were apprehended leaving the house were in possession of the

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[5]Petitioners also claim (Pet. 14-16) that because the indictment did not specify each of the four characteristics of the destructive device in *United States* v. *Peterson, supra*, it was fatally defective. As we have pointed out above, however, the Ninth Circuit did not hold that any of the elements of the device in that case was essential to constitute a "destructive device" within the meaning of Section 5845(f). The indictment adequately alleged the essential elements of the crime charged, tracking in large part the language of the statute. Accordingly, there is no merit to this contention.

elaborate incendiary device found inside was not only reasonable, but virtually compelled.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]The cases cited by petitioners cast no doubt on the sufficiency of the evidence in this case. In both *United States* v. *Birmley*, 529 F. 2d 103, 107-108 (6th Cir. 1976), and *United States* v. *Gates*, 491 F. 2d 720, 721 (7th Cir. 1974), the courts held that mere presence as a passenger in a car is insufficient to prove possession of a firearm found in the car. Compare *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 163-167 (1979). In *Birmley* and in *Gates* the defendant whose conviction was reversed was only a passenger in a car, not the driver or the owner. Nor were any other facts established to indicate any connection between the defendant and the firearm other than his proximity to it. Similarly, in *United States* v. *Holland*, 445 F. 2d 701, 703 (D.C. Cir. 1971), the court held that the defendant's presence in another person's apartment, without more, was insufficient to show that he possessed illegal drugs found there. There was no showing that Holland lived there or frequented the home; it was just as likely, the court reasoned, that the woman who lived there procured the drugs for her own use and that the defendant had no connection with them.

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